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IN THE
Supreme Court of the
United States

OCTOBER TERM, 1937.

No. **8** **13**

EARLE S. WELCH,

Appellant,

VS.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer
of the State of Wisconsin,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE
STATE OF WISCONSIN.

APPELLANT'S BRIEF OPPOSING APPELLEES'
MOTION TO DISMISS THE APPEAL.

JOHN M. CAMPBELL,
Attorney for Appellant.

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MOTION TO DISMISS THE APPEAL.**

Pursuant to Paragraph 3 of Rule 12 of the Rules of this
Court, appellee has filed a Statement opposing appellate
jurisdiction, and has included a motion to dismiss the ap-

peal. The motion for dismissal of the appeal is made upon the ground that no substantial federal question is presented thereby.

The appeal is from a judgment of the Supreme Court of the State of Wisconsin reported at ~~223 Wis. 319~~ ^{277 N.W. 2d 100} sustaining the validity and constitutionality of Section 6, Chapter 15 of the Laws of Wisconsin for the year 1935 against appellant's objection that the same violated Section 1 of the Fourteenth Amendment to the Federal Constitution. The material portions of the enactment are set forth in appellers statement opposing appellate jurisdiction.

Briefly stated, the situation is this: By Sec. 71.04 (4) of the general income tax law prevailing in Wisconsin for a number of years last past, including the year 1933, it had been and still is provided that, for normal tax purposes, persons other than corporations, in reporting income, shall be allowed, among other deductions from gross income, a deduction for dividends received from Wisconsin corporations. In the year 1935 the legislature passed Chapter 15, Laws of Wisconsin for 1935. By Sec. 2 of Chapter 15 an emergency relief income tax was levied on 1934 income including, among other things, all dividends from whatsoever source derived. By Sec. 6 of Chapter 15, which was entitled "Emergency Relief Tax on certain 1933 dividends", another emergency income tax was levied on all persons, other than corporations who had received dividends in the year 1933, from Wisconsin corporations. Nothing else was to be taxed under Section 6. Both Section 2 and Section 6 provided for a progressive rate of taxation. The rate of taxation under Section 2 was the same as the rate applicable to 1934 income under the general income tax law. The rate of taxation under Section 6 was differently graduated as well as higher.

Appellant, in the year 1933, had gross income from all sources in the amount of \$13,383.26. Of this amount \$12,133.60 was dividends from Wisconsin corporations, not subject to income tax for normal tax purposes. He had deductions properly allowable for normal tax purposes in the amount of \$11,061.97, leaving him an actual income in 1933 of \$2,321.29. He also had an allowable deduction of \$100 for donations. As a result, appellant had no net income whatever in 1933 subject to normal tax. Pursuant to the provisions of Sec. 6 of Chapter 15, Laws of 1935 an emergency income tax was assessed against appellant on account of the \$12,133.60 dividends which he had received from Wisconsin corporations in 1933. The tax, at the rates provided for by Section 6 (which, as heretofore stated were different and higher rates than those provided for by the general income tax law or by Section 2 of Chapter 15) amounted to \$545.71. This tax he paid under protest and then sued to recover it back, claiming that Sec. 6 of Chapter 15 Laws of 1935 violated certain provisions of the Wisconsin Constitution as well as Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The record presents the question whether Sec. 6 of Chapter 15 Laws of Wisconsin for 1935 is repugnant to either the equality clause or the due process clause of the Fourteenth Amendment or to both of these clauses. Appellant contends that it was repugnant to both. It is claimed that Sec. 6 of Chapter 15 violated the equality clause in that it was an attempted classification for taxation purposes which was arbitrary and unreasonable, which did not rest upon any ground of difference, having a fair and substantial relation to the object of the legislation and which did not treat alike all persons similarly circumstanced. That such a classifica-

tion would be repugnant to the equality clause of the Fourteenth Amendment is well established.

Louisville Gas & El. Co. vs. Coleman, 277 U. S. 32, 37.

Colgate vs. Harvey, 296 U. S. 404.

The attempted classification is claimed to have been discriminatory, arbitrary and unjust in the following respects:

- (1) Section 6 of the Act levied an emergency income tax on dividends received from Wisconsin corporations, but not on dividends received from any other source.
- (2) It levied an emergency income tax on persons receiving dividends from Wisconsin corporations in 1933, but did not levy a similar tax against any person on account of the receipt by him of any other kind of income in 1933.
- (3) Section 6 of the Act levied an emergency income tax on dividends received from Wisconsin corporations in 1933, and by Section 2 of the Act the same stockholders, together with all other income taxpayers, were subjected to another and additional emergency tax on their 1934 income, including dividends of that year from whatever source derived.
- (4) Section 6 of the Act arbitrarily discriminated between the recipients of dividends from Wisconsin corporations in 1933 and the recipients of similar dividends in other years prior to 1935, though the recipient of such dividends in 1933 bore no peculiar relation to the burden of relief in 1935 and had no peculiar ability to pay in 1935 as compared with recipients of such dividends in other years prior to 1935.
- (5) Section 6 of the Act prescribed a different and higher rate of taxation on dividends received from Wisconsin corporations in 1933 than the rate which was applicable to other income in the year 1933, whether from dividends or otherwise, and a different and higher rate than that applicable to income including dividends received in 1934 and

taxable under Section 2 of the Act, and a different and higher rate than that applicable to 1934 income, including dividends, under the general income tax law.

(6) Section 6 of the Act imposed an emergency relief tax upon the dividends received from one particular source having no reasonable relation to nor reflecting the taxpayer's actual income or ability to pay, thereby placing an unequal burden upon the several members of the class created by Section 6.

The legislation in question is further claimed to have violated also the due process clause of the Fourteenth Amendment for the following reasons:

(1) Because it operated retroactively and in 1935 subjected to taxation income which in 1933 had been exempt, and which was not income received during a period next antecedent to the enactment nor income received within such a "recent" period as to have some connection with the time of the enactment.

(2) Because appellant had paid the tax assessable and assessed against his 1933 income according to the law then in force. His 1933 income had ceased to be income and had become capital, and to tax it in 1935 was an arbitrary impairment of his vested rights. Vested property rights are protected against state action by the provisions of the Fourteenth Amendment that no state "shall deprive any person of life, liberty or property without due process of law" (12 C. J. 957 Sec. 496).

It seems to us that the case at bar presents none of those features which characterize the cases where it was held that no substantial constitutional question was presented. The jurisdiction of the court is invoked upon the ground that ap-

pellant's right to equality under the law and to due process of law, has been invaded. Appellant is not seeking merely to question the wisdom or merit of the particular legislation involved. He does not complain merely of an ill-advised or burdensome law otherwise within the legitimate sphere of legislative power. He is seeking to have the court determine, not whether the State Supreme Court erred in its construction of Section 6 of Chapter 15, Laws of 1935, but whether the legislation is repugnant to the constitution of the United States. There is something more involved than simply a question as to the right of the state to withdraw a privilege gratuitously granted. Appellant contends that the situation presents a case of arbitrary spoliation of property. We believe the record discloses that there exists some color of foundation and some fair ground for asserting a violation of the equality and due process clauses of the Fourteenth Amendment, and that there is presented a real and not a merely formal federal question. That appears to be one of the well recognized tests for determining whether a substantial question is presented.

New Orleans Waterworks Co. vs. Louisiana, 185 U. S. 336. 344.

Equitable Life Assur. Soc. vs. Brown, 187 U. S. 308.

In this connection we regard it as worthy of mention that the sole controversy between the parties in the state court was as to whether or not the Act of 1935 violated certain provisions of the State constitution and the equality and due process clauses of the Fourteenth Amendment to the Constitution of the United States. These were the sole questions presented for decision either in the trial court or in the State Supreme Court and they were passed upon and

decided by both of these tribunals. The trial judge deemed it unnecessary to pass upon all of the contentions raised by appellant and placed his decision in favor of appellant upon the ground that the Act in question was unconstitutional because it denied to appellant and to other persons who received dividends in the year 1933 the equal protection of the law. He filed with his decision an elaborate and exhaustive opinion which is a part of the record here, and in which he stated at length the reasons that compelled him to this conclusion. On appeal to the State Supreme Court that court reversed the trial judge, but three of the seven justices of the Supreme Court dissented from the majority and were of the opinion that the Act of 1935 violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as well as the due process clause of that amendment for the reason and upon the grounds stated in detail in the two dissenting opinions filed by them and likewise made a part of the record herein. It appears to us that this diversity of opinion between the four majority justices on the one hand and the three minority justices and trial judge on the other hand, of itself, is a persuasive circumstance that the contentions of appellant are not to be considered so manifestly frivolous and so devoid of merit that the court will reject them at a glance.

Furthermore, so far as we have been able to find, the questions raised by appellant on his appeal to this court have not been foreclosed by a prior decision or decisions of this court, in consequence of which it could be claimed that no further room is left for real controversy, which seems to be recognized as another test of the existence of a "substantial constitutional question." (Equitable Life Assur. Soc. vs. Brown, 187 U. S. 308, Zucht vs. King, 260 U. S. 174). We

know of no case in this court where the precise questions here presented were decided adversely to appellant's contentions. On the contrary, such cases as we have been able to find bearing upon the claimed violation of the equality clause of the Fourteenth Amendment would appear to uphold appellant's contentions.

Colgate vs. Harvey, 296 U. S. 404.

Nat. L. Ins. Co. vs. United States, 277 U. S. 508.

Louisville Gas & El. Co. vs. Coleman, 277 U. S. 32.

Air-Ways El. A. Co. vs. Day, 266 U. S. 71.

F. S. Royster Guano Co. vs. Virginia, 253 U. S. 412.

Travis vs. Yale & Town Mfg. Co., 252 U. S. 60.

Appellant, therefore, believes that his appeal presents a substantial constitutional question.

Respectfully submitted,

JOHN M. CAMPBELL,
Attorney for Appellant.

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Appellees.

APPELLANT'S BRIEF.

**JOHN M. CAMPBELL,
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Appellees.

APPELLANT'S BRIEF.

THE OPINIONS OF THE COURT BELOW.

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin reported at 226 Wis. 595. The questions involved in said appeal were originally considered by said Supreme Court of the State of Wisconsin upon an appeal to that court from an order overruling a demurrer to the original complaint. The opinions delivered upon said first appeal are reported at 223 Wis. 319.

GROUNDS FOR JURISDICTION OF THE SUPREME COURT.

Paragraph 1 of Rule 12 has been complied with and a subsequent motion by the appellees to dismiss the appeal has been denied. The grounds on which the jurisdiction of the Supreme Court is invoked are therefore not here repeated.

STATEMENT OF THE CASE.

By Chapter 15 of the Laws of Wisconsin for 1935 the State of Wisconsin undertook, among other things, to raise money to be used for purposes of "Emergency Relief". To that end several taxes were levied by the Act in question. Included therein was the tax levied by Section 6 of said Chapter. This Act which was approved on the 14th day of March, 1935, and published March 27, 1935, purported in Section 6 to levy a tax at a graduated and progressive rate upon residents of the State of Wisconsin measured by the amount of dividends which they had received during the year 1933 from corporations specified in the Act. In general these corporations whose dividends were thus taxed were those corporations which themselves had paid such income taxes to the State of Wisconsin that their dividends had not been included in income subject to normal income tax by the State during the year 1933.

The appellant, a resident of the State of Wisconsin, received certain gross income during the year 1933 in the amount of \$13,383.26, of which amount \$12,156.10 was from dividends of Wisconsin corporations of the sort specified in Section 6 of Chapter 15 of the Laws of 1935 (Tr. 15). In the determination of his income subject to normal tax during the year 1933 plaintiff had been permitted to deduct

these dividends (Tr. 13). During that year he had other deductions properly allowable for purposes of normal tax, including taxes paid, interest paid, business expenses and capital losses in the amount of \$11,061.97 (Tr. 15), leaving him with a net income during the year, including the dividends in question, of \$2,321.29 (Tr. 15). Under the purported authority of Section 6 of Chapter 15 of the Laws of 1935 the appellant was required to pay an emergency relief tax in the sum of \$556.84 (less discount for prompt payment) on account of his receipt during the year 1933 of the \$12,156.10 of dividends which he had received (Tr. 16). This payment was made under protest and the present suit was brought for its recovery as specifically authorized by the Act in question. The grounds alleged in the complaint as the basis for such recovery were that said Section 6 of Chapter 15 of the Laws of 1935 was in violation of provisions of the Constitution of the State of Wisconsin and of the Fourteenth Amendment to the Constitution of the United States (Tr. 17). No disputed questions of fact are raised in the record. The appellees demurred to the appellant's amended complaint (Tr. 18), said demurrer was sustained and the judgment here appealed from was entered upon said demurrer (Tr. 19).

ERRORS ASSIGNED WHICH ARE INTENDED TO BE URGED.

The appellant intends to rely upon the following points which were set out in his "statement of points to be relied upon" filed at the time of granting the appeal (Tr. 22).

1. Section 6 of Chapter 15 of the Laws of Wisconsin for 1935 purporting to assess the taxes herein sought to be recovered back by appellant is in violation of the provisions